

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

¹ The original request was for an exception to the regulations, but the proper term under the regulations is "variance".

2. The petitioner receives services through the Home Based Medicaid Waiver program of Choice for Care. Services are provided through the Franklin County Home Health Agency.

3. The petitioner's July 28, 2005 functional assessment of Activities of Daily Living (ADL's) indicates that the petitioner needs:

Extensive Assistance with:

Dressing
Bathing
Mobility

Total Dependence with:

Personal Hygiene
Bed Mobility
Toilet Use
Adaptive Devices
Transferring
Eating

4. The petitioner lives with his spouse and two teenage children.

5. On or about April 24, 2006, J.G., case manager for Franklin County Home Health Agency submitted a request to DAIL requesting an exemption or waiver to allow them to hire petitioner's spouse as a personal care attendant.

6. Providing care to petitioner has been a challenge because petitioner is highly selective in who he allows to provides care for him. Petitioner will allow his spouse, one

R.N. and one L.P.N. to assist with his hygiene needs.

Petitioner's spouse believes that petitioner's difficulty with the staff caring for him stems from his stroke and resulting brain injury.

7. In support of the variance request, petitioner's primary registered nurse wrote:

I have never seen such a challenging case . . . very few succeed due to communication barriers or personality conflicts . . . [petitioner] will not communicate, accept sandwiches, drinks or ANY personal care if he does not have a good rapport with the one who is providing care. I have seen him sit in his feces while refusing care. . . Because of these barriers [petitioner] is at risk for multiple health issues such as skin break down (due to incontinence), a second intercerebral hemorrhage (if the client refuses his hypertensive medications), continuing depression, and respiratory complications (due to immobility). . . In addition, I have noticed mental effects from the intercerebral bleed.

8. Petitioner's request for a variance came about due to changed familial circumstances. Petitioner and his family had rented from the same landlord for approximately twelve years. The landlord's decision to demolish their house led them to find a new rental; the new rent is double their old rent. The family has been managing on petitioner's Social Security income and a third party disability payment. According to petitioner's spouse, the new rent puts the family \$450 over budget. To meet their new expenses,

petitioner's spouse believes she will need to find a job outside the home; she fears the consequences to petitioner if she is not present to provide his personal care including hygiene.

9. In the Franklin County Home Health Agency application for a variance, J.M. explained that they wanted to hire the petitioner's spouse to take the majority of the personal care attendant hours so she could remain in the home with petitioner. J.M. indicated that the petitioner's spouse was already providing 80 percent of the petitioner's care.

10. On May 16, 2006, the request for an exception or variance was denied. The basis for the denial was a lack of adequate support for the variance and that petitioner's needs are being met under the current plan. In the notice, DAIL noted that they plan to establish a program in which spouses may be paid as personal care attendants and hope to do so in the fall.

11. On June 15, 2006, a request for fair hearing was filed.

12. Lorraine Wargo, director of the Individual Supports Unit of DAIL, stated in an affidavit that there is no protocol in place for waiving the Medicaid prohibition against paying a spouse for personal care services and that

they have not waived this provision or granted a variance to allow payment to a spouse as part of the Choices for Care program. However, there was a representation by DAIL's counsel that one exception had been made.

ORDER

The decision of DAIL denying a variance is reversed and the case is remanded consistent with this decision.

REASONS

The purpose of the Choices for Care program is to allow equal access to either nursing home care or home based care consistent with the choice of the recipient. Choices for Care (CFC) 1115 Long-term Care Medicaid Waiver Regulations § I. Governing policies are based on programming that is both recipient centered and cost effective. C.F.C. Regulations § II (A) (B); CFC Vermont Long-Term Care Medicaid Program Manual, Highest and High Need Groups § 1(A) (B). The Choices for Care program and its predecessor programs have allowed severely disabled individuals the option to remain in their homes.

The Choices for Care program was approved as an 1115 waiver program by the Centers for Medicare and Medicaid

Services. In doing so, the federal government allows a state to disregard certain Medicaid requirements.

An initial issue in this case is that a spouse cannot be paid for services under the Medicaid program. DAIL has argued that they have no authority to allow a spouse to be paid as a personal care attendant from Medicaid funds. The regulation states:

No payment will be made for certain items and services including the following:

- F. Care and services furnished by an immediate relative of the beneficiary or by a facility, such as a nursing home, of which an immediate relative is owner or principal stockholder. For purposes of this section, "immediate relative" includes spouse.
. . .

Medicaid Manual § M152.1(F).

Proscribing payment of spouses for personal care services is repeated in § IV.3(E)(4) of the CFC Long-Term Care Medicaid Program Manual, Highest & High Need Groups.

The petitioner argues that this section has been superseded by the provisions of the Choices for Care waiver and points to the Centers for Medicare and Medicaid Services: State of Vermont "Choices for Care" Demonstration Waiver, Operational Protocol approved July 1, 2005 and last revised November, 2005. In particular, petitioner points to Section

K: Covered Benefits Under the Demonstration. The relevant sections state:

Description of Amount, Duration & Scope of Services for Each Demonstration Group & Interface with Other Services. . . There are two types of Personal Care Service providers. . . Services may be provided by Home Health Agencies as defined by State statute; other providers certified, designated or approved by the State; or by attendants hired, trained and supervised by qualified consumers or their surrogates. This includes attendants who are qualified spouses providing personal care under the demonstration (TBD). . .

Long Term Care Service Descriptions

. . . Services may be provided by Home Health Agencies as defined by State statute. . . Under this demonstration Vermont will expand the use of relative caregivers on a compensated basis to include spouses. The state will make the determination as to whether the spouse is able to provide the personal care services included in the enrollee's care plan and is also the best provider to do so. . .

Relative Caregivers

. . . Over the course of the demonstration, DAIL will also establish the parameters under which the family member personal care attendant policy will be expanded to include spouses. The Department will gather input from participants who would like to hire their spouses as attendants, and from the case managers who have knowledge of the participant's family situation. DAIL will put together a work group that will evaluate the advantages and disadvantages of other states that have implemented this option within their programs. . .

The implication of the above section is that the Medicaid proscription against paying spouses as personal care attendants is waived and that DAIL will have the authority to

authorize payment to spouses as personal care attendants once they define the criteria for approving a spouse to be a qualified personal care attendant.

The problem is that DAIL has not yet defined the criteria to determine when a spouse will be qualified for payment as a personal care attendant. It is understandable that there is a need for criteria before approving the payment to a spouse as a personal care attendant. Not every spouse will be well suited or appropriate for the position.

However, DAIL's failure to act has placed the petitioner and his spouse in limbo.² The question is whether there is any other avenue for considering whether petitioner's spouse should be employed as a personal care attendant through the local Home Health Agency.

DAIL has the authority to grant a variance or exception to their regulations. Variance is defined as "an exception to or exemption from these regulations granted by the Department as allowed under applicable statute and regulation." Choices for Care, 1115 Long-term Care, Medicaid Waiver Regulations § III(50).

² It is our hope that this case will spur DAIL into developing these criteria.

The applicable regulation states:

Variances

- A. The Department may grant variances to these regulations. Variances may be granted upon the determination that:
 - 1. The variance will otherwise meet the goals of the Choices for Care waiver; and
 - 2. The variance is necessary to protect or maintain the health, safety or welfare of the individual.
 - . . .
- C. Variance requests shall be submitted in writing, and shall include:
 - 1. A description of the individual's specific unmet need(s);
 - 2. An explanation of why the unmet need(s) cannot be met; and
 - 3. A description of the actual/immediate risk posed to the individual's health, safety or welfare.
- D. In making a decision regarding a variance request, the Department may require further information and documentation to be submitted. The Department also may require an in-home visit by Department staff..

Choices for Care, 1115 Long-term Care,
Medicaid Waiver Regulations § XI.

See also Choices for Care, Vermont Long-
Term Medicaid, Program Manual, Highest &
High Need Groups § V.8(III).

Franklin County Home Health Agency submitted a request
for variance to put in place a provider of services,

petitioner's spouse, to ensure that petitioner's needs would continue to be met. Their fear is that petitioner's health will deteriorate if his spouse has to work outside the home and is not present to provide needed care; especially hygiene. They have documented the difficulty they have in finding nurses and attendants who can work with the petitioner.

DAIL has been adamant that a spouse cannot be paid from Choices for Care funds. Accordingly, their review of the variance request appears cursory. There is disputed evidence whether DAIL previously granted such a variance to another spouse to provide personal care services under the Choices for Care program. However, the regulations show that payment to spouses is anticipated under this program. A proper review of the variance criteria should occur. Accordingly, DAIL's decision that they do not have the authority to grant a variance is reversed and the case is remanded for a proper review of the variance criteria. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 17.

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